BLANK PAGE

BLANK PAGE

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statement	2
Statutes and regulations involved	4
Summary of Argument	4
Argument: The taxpayers' losses upon the corporate liquidation were capital losses in 1929 within section 101 of the Revenue Act of 1928	5
I. Losses on corporate liquidation are capital losses within section 101 (c) (2)	6
A. A corporate liquidation is a "sale or exchange" within the words of section 101 (c) (2)	7
B. Treasury regulations require treatment of the losses as capital losses	9
C. The legislative history of sections 115 (c) and 101 supports the respondent's construction	11
D. Losses, as well as gains, on corporate liquidations are within section 101	12
II. The taxpayers' losses are not deductible under sections 112 and 23 (e) apart from sections 101 and 115 (c)	16
A. Sections 115 (c) and 101 are not mutually exclusive	16
B. Congress, by reenactment of sections 201 (c) and 208 of the 1924 Act, did approve Article 1545 of Regulations 65	19
C. The respondent's construction of section 115 (c) is not contrary to its history and purpose	20
D. The respondent's construction does not involve a harsh or absurd result	23
III. In No. 97 recovery is limited in any event to $127.64 with interest because the refund claim was filed too late with respect to any additional amount	25
Conclusion	30
Appendix	31

CITATIONS

Cases:	
Blair v. *Birkenstock*, 271 U. S. 348	26
Brewster v. *Gage*, 280 U. S. 327	11
Broderick v. *Anderson*, 23 F. Supp. 488	26

107408—38——1

Cases—Continued. Page

Burnet v. *Harmel*, 287 U. S. 103 19
Childs v. *Commissioner*, 35 B. T. A. 1125 ..... 7, 8
Echols v. *Commissioner*, 61 F. (2d) 191 ..... 7, 24
Harr v. *United States*, 20 F. Supp. 206 26
Hellmich v. *Hellman*, 276 U. S. 233 ..... 7, 8
Helvering v. *Bliss*, 293 U. S. 144 ..... 11, 22
Helvering v. *City Bank Co.*, 296 U. S. 85 11
Helvering v. *Twin Bell Syndicate*, 293 U. S. 312 24
Helvering v. *Winmill*, No. 11, present term, decided November 7, 1938 11
Lang v. *Commissioner*, 289 U. S. 109 24
Langstaff v. *Lucas*, 9 F. (2d) 691, affirmed, 13 F. (2d) 1022, certiorari denied, 273 U. S. 721 ..... 7, 8
McCaughn v. *Hershey Chocolate Co.*, 283 U. S. 488 11
McFeely v. *Commissioner*, 296 U. S. 102 ..... 11, 19
McKee et al., Trustees v. *Commissioner*, 35 B. T. A. 239 19
New Colonial Co. v. *Helvering*, 292 U. S. 435 24
Piper v. *Willcuts*, 64 F. (2d) 813 13
Universal Battery Co. v. *United States*, 281 U. S. 580 11
United States v. *Fairbanks*, 95 F. (2d) 794, certiorari denied, No. 65, October 10, 1938 ..... 18, 19
Weaver Co. v. *Commissioner*, 97 F. (2d) 31, now pending on writ of certiorari, No. 304 6

Statutes:

Revenue Act of 1918, c. 18, 40 Stat. 1057:
Sec. 250 27
Sec. 252 27

Revenue Act of 1921, c. 136, 42 Stat. 227:
Sec. 206 11

Revenue Act of 1924, c. 234, 43 Stat. 253:
Sec. 201 36
Sec. 208 37
Sec. 1019 27

Revenue Act of 1926, c. 27, 44 Stat. 9:
Sec. 201 37
Sec. 208 37

Revenue Act of 1928, c. 852, 45 Stat. 791:
Sec. 11 31
Sec. 12 31
Sec. 13 17
Sec. 21 31
Sec. 22 31
Sec. 23 32
Sec. 56 27
Sec. 57 27
Sec. 101 32

Statutes—Continued. Page

Sec. 111 35
Sec. 112 36
Sec. 115 36
Sec. 321 ..... 27, 28
Sec. 322 26
Revenue Act of 1932, c. 209, 47 Stat. 169:
Sec. 101 9
Sec. 115 9
Revenue Act of 1934, c. 277, 48 Stat. 680:
Sec. 115 14
Sec. 117 14
Revenue Act of 1938, Pub., No. 554, 75th Cong., 3d Sess.,
Sec. 23 23
Miscellaneous:
House Report No. 179, 68th Cong., 1st Sess., p. 11 12
House Report No. 704, 73d Cong., 2d Sess., p. 30 15
Senate Report No. 398, 68th Cong., 1st Sess., p. 11 12
Senate Report No. 558, 73d Cong., 2d Sess., p. 37 15
Treasury Regulations 65, Art. 1545 10
Treasury Regulations 69, Art. 1545 10
Treasury Regulations 74, Art. 625 ..... 9, 38
Treasury Regulations 77:
Art. 125 10
Art. 625 12
Art. 1545 4
Tyler and Ohl, *The Revenue Act of 1934*, 83 U. Pa. L. R.
607 (1935) 13

BLANK PAGE

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 96

HAROLD T. WHITE, ALEXANDER M. WHITE, JR., AND WILLIAM I. FROTHINGHAM, AS EXECUTORS OF THE ESTATE OF ALEXANDER M. WHITE, PETITIONERS

v.

THE UNITED STATES

No. 97

HAROLD T. WHITE, SOLE SURVIVING EXECUTOR OF THE ESTATE OF WILLIAM A. WHITE, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims for the United States is reported in 21 F. Supp. 361 (R. 37–47).

JURISDICTION

The judgments of the Court of Claims were entered December 6, 1937 (R. 47–48). Motions for a new trial were overruled on March 7, 1938 (R. 48). A petition for writs of certiorari was filed on June 7, 1938 (R. 48), and was granted on October 10, 1938. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether stockholders' losses in a corporate liquidation upon their stock held more than two years are ordinary losses under section 23 of capital losses under section 101 of the Revenue Act of 1928.

2. In No. 97, whether the refund claim was filed too late to recover any amount in excess of $127.64.

STATEMENT

The facts in the two cases are identical except as to the amounts of the losses, and are contained in the special findings of fact of the court below (R. 37–44), which may be summarized as follows:

Prior to March 17, 1927, Alexander M. White paid $110,000 for $110,000 face amount of the bonds of the Seabrook Company and William A. White paid $50,000 for $50,000 face amount of these bonds (R. 41). In 1925 the Seabrook Company's name was changed to Del-Bay Farms, Inc., hereinafter referred to as the New Jersey corporation. Pursuant to a plan of reorganization Alexander M.

White acquired 1,100 shares of preferred stock of Del-Bay Farms, Inc., a Delaware corporation, in exchange for his bonds of the New Jersey corporation of the same name; and the estate of William A. White received 500 shares of the same stock for its bonds of the New Jersey corporation (R. 41, 43).

On April 11, 1929, the Delaware corporation was dissolved, its activities ended, and its office closed. Following this a liquidating dividend of $5 was paid on each share of preferred stock, whereupon such stock became worthless. Upon the complete liquidation of the Delaware corporation Alexander M. White sustained a loss of $104,500, and the estate of William A. White a loss of $22,500 (R. 43–44).

The petitioners deducted the above losses in full in their returns for the year 1929. The Commissioner determined that the losses were subject to the "capital net loss" provisions of the 1928 Act and found deficiencies, which were paid. Claims for refund were filed and rejected (R. 38–41). Suits were instituted in the Court of Claims, which upheld the determination of the Commissioner.

In No. 97 the last installment of the tax for the year 1929 shown as due on income tax return of the estate of William A. White was paid on December 15, 1930, in the amount of $885.28. On December 31, 1931, $757.64 and interest was refunded to the estate by the Commissioner of Internal Revenue (R. 40). Claim for refund of $446.06, the amount sought to be refunded in this suit, was filed on December 15, 1932 (R. 41).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 31–38.

SUMMARY OF ARGUMENT

I. The taxpayers' losses in the corporate liquidation upon their stock held for more than two years were capital losses because a corporate liquidation is a "sale or exchange" within section 101 (c) (2) of the Revenue Act of 1928. Section 115 (c), providing that amounts "distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock," requires the determination that a corporate liquidation is a "sale or exchange." Treasury Regulations (Regulations 77, Article 1545), approved by Congress by re-enactment of sections 101 and 115 (c), require treatment of these losses as capital losses. The legislative history of sections 101 and 115 (c) supports this view that losses and gains on corporate liquidations are within section 101.

II. Losses upon corporate liquidations are not deductible, as the taxpayers contend, under sections 23 (e) and 112, apart from sections 101 and 115 (c). The entire plan of the 1928 Act requires the conclusion that sections 23 (e), 101, and 115 (c) are not mutually exclusive but are interdependent. This construction does not involve, as the taxpayers contend, a harsh or absurd result.

III. In No. 97 recovery is limited in any event to an alleged overpayment of $127.64 on December

15, 1930, because the refund claim filed on December 15, 1932, is untimely with respect to any additional amount.

ARGUMENT

THE TAXPAYERS' LOSSES UPON THE CORPORATE LIQUIDATION WERE CAPITAL LOSSES IN 1929 WITHIN SECTION 101 OF THE REVENUE ACT OF 1928

In 1929 the taxpayers, upon the complete liquidation of a corporation, received a dividend and realized losses on their preferred stock in the corporation which they had received pursuant to a plan of reorganization in exchange for bonds of another corporation which they had held since 1925. It is not disputed that within section 101 (c) (8) of the Revenue Act of 1928 the preferred stock was capital assets, held for a period of more than two years, which is determined by including the period for which the bonds were held by the taxpayer. The only question is whether the corporate liquidation was a "sale or exchange of capital assets" within section 101 (c) (2).

The taxpayers deducted their entire losses on the preferred stock in their 1929 income tax returns. The Commissioner of Internal Revenue (R. 18–19) and the court below (R. 45–47) determined that the loss of each taxpayer was a "capital loss * * * resulting from the sale or exchange of capital assets" within section 101 (c) (2) and deductible under 101 (b) only to the extent of a deduction of 12½ per centum of the "capital net loss" from the

partial tax computed upon the ordinary net income as if section 101 had not been enacted. The taxpayers' petition for certiorari, granted October 10, 1938, asserts a conflict with *Chester N. Weaver Co.* v. *Commissioner*, 97 F. (2d) 31 (C. C. A. 9th), No. 304, present term, pending on certiorari granted October 10, 1938, to be argued immediately after this case.

The taxpayers contend that a loss upon a corporate liquidation is not a capital loss upon a "sale or exchange of capital assets" within section 101 (c) (2) and that their entire losses on the corporate liquidation are deductible under section 23 (e) as losses sustained by individuals within the taxable year. The respondent contends (I) that losses upon a corporate liquidation are capital losses deductible under the limitations of section 101 (b), and (II) that the authorities cited by the taxpayers do not support their contention that these losses are not capital losses.

I

LOSSES ON CORPORATE LIQUIDATION ARE CAPITAL LOSSES WITHIN SECTION 101 (c) (2)

The decision of the court below that losses on corporate liquidations are capital losses is supported by (A) the decisions applying section 115 (c) and treating a corporate liquidation as the sale or exchange of stock; (B) the Treasury regulations; and (C) the legislative history of sections 101 and 115 (c).

A. *A corporate liquidation is a "sale or exchange" within the words of section 101 (c) (2)*

Section 101 (c) (2) provides:

> "Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

Section 115 (c) provides in part:

> *Distributions in liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. * * *

The decisions applying section 115 (c) hold that corporate liquidations shall be treated as what they in effect are—sales of stock to the corporations in liquidation, taxable in like manner as if the stockholders had sold their stock to third persons. *Hellmich* v. *Hellman*, 276 U. S. 233, 237; *Langstaff* v. *Lucas*, 9 F. (2d) 691, 694 (W. D. Ky.), affirmed, 13 F. (2d) 1022 (C. C. A. 6th), certiorari denied, 273 U. S. 721; *Mary S. Childs* v. *Commissioner*, 35 B. T. A. 1125, 1127; cf. *Echols* v. *Commissioner*, 61 F. (2d) 191 (C. C. A. 8th).

In the *Hellmich* case this Court rejected the taxpayers' contention that gain on amounts dis-

tributed to them as stockholders in a corporate liquidation out of earnings after February 28, 1933, were "dividends" under sections 201 (a) and 216 (a) of the 1918 Act for the purpose of the credit allowed in respect of the normal tax and held that the amounts distributed were not "dividends" but were payments in exchange for stock under section 201 (c), similar to section 115 (c) of the 1928 Act, and were subject to the normal tax as other gains or profits. The opinion of the Court, by Mr. Justice Sanford, states at page 237:

> The gains realized by the stockholders from the distribution of the assets in liquidation were subject to the normal tax in like manner as if they had sold their stock to third persons.

Similarly in the present case the taxpayers' contention that losses on the corporate liquidation were deductible under section 23 (e) and were not capital losses under sections 115 (c) and 101, must fail.

In the *Langstaff* case the District Court, reaching the same result which this Court later reached in the *Hellmich* case, said at page 694:

> This section [201 (c) of the 1918 Act] strips distributions made to stockholders in liquidation of the corporation of all disguises and declares that they shall be considered for what they in effect are—purchases of all their outstanding stock by the liquidating corporations, and not dividends as generally

understood, and as defined in section 201, subsection (a), and as used in section 216.

The Circuit Court of Appeals affirmed upon the reasoning of the District Judge and stated (13 F. (2d) 1022) that the amount distributed in liquidation "became the proceeds of the sale of Langstaff's stock in the corporation, instead of a corporate dividend."

In *Mary S. Childs* v. *Commissioner, supra,* the Board upheld taxpayer's contention that in view of sections 115 (c) and 115 (f) of the 1932 Act the gain on redemption of preferred stock held more than two years, considered as a partial liquidation, was capital gain within section 101 (c) (1), similar to section 101 (c) (1) of the 1928 Act here involved.

It is submitted, therefore, that for tax purposes liquidations are in effect "sales or exchanges" of stock within the meaning of that phrase throughout the Revenue Acts and in section 101 (c) (2). Nothing in the language of section 101 (c) (2) indicates that the phrase has a different or more restricted meaning than that required by section 115 (c).

B. *Treasury Regulations require treatment of the losses as capital losses*

Treasury Regulations 74, Article 625 (1928 Act), *infra,* p. 38, provide in part:

> Any gain to the shareholder [resulting from a distribution in liquidation of a cor-

poration] may, at his option, be taxed as a capital net gain in the manner and subject to the conditions prescribed in Section 101 and Articles 501–503.

The Commissioner of Internal Revenue in the present case relied on the fact that under the regulations gains upon corporate liquidations could be taxed, at the taxpayer's option, at the flat capital gain rate, in determining that losses on corporate liquidations are subject to the complementary provisions with respect to capital losses (R. 45–47).

This regulation, pursuant to section 115 (c), correctly treats a corporate liquidation as a "sale or exchange of capital assets" within section 101 (c) (1) for purposes of permitting taxpayers the option of being taxed at the flat capital gain rate. Identical provisions were contained in Article 1545 of Regulations 65 and 69 and Article 125 of Regulations 77, with relation to sections 201 (c) and 208 of the Revenue Acts of 1924 and 1926 and sections 115 (c) and 101 of the 1932 Act, similar to sections 115 (c) and 101 of the 1928 Act.[1] The court below correctly held that this repeated reenactment of sections 201 (c) and 208 of the 1924 Act, consistently interpreted in the administrative regulations as giving the taxpayer the option to have gains on corporate liquidations taxed as gains on the "sale or exchange of capital assets", constitutes definite

[1] Identical provisions are not found in the regulations with respect to the 1921 and earlier Acts and the 1934 and later Acts because the statutory provisions in those Acts are different.

Congressional approval of the respondent's construction of sections 115 (c) and 101 of the 1928 Act. *Helvering* v. *Winmill*, No. 11, present term, decided November 7, 1938, pamph., p. 3; *McFeely* v. *Commissioner*, 296 U. S. 102; *Helvering* v. *Bliss*, 293 U. S. 144, 151; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492; *Universal Battery Co.* v. *United States*, 281 U. S. 580, 583–585; *Brewster* v. *Gage*, 280 U. S. 327, 337.

C. *The legislative history of sections 115 (c) and 101 supports the respondent's construction*

The respondent submits that in view of section 115 (c), a corporate liquidation is so plainly a "sale or exchange" of capital assets within section 101 on the face of the statute that recourse to legislative history to support a different construction would not be available. *Helvering* v. *City Bank Co.*, 296 U. S. 85, 89. The legislative history, however, supports the respondent's construction and may be considered for that purpose.

The provisions of sections 115 (c) and 101 first appeared together in the same statute in sections 201 (c) and 208 of the Revenue Act of 1924. Section 208 (c) for the first time, by a provision complementary to the 12½ per cent tax on capital gains, limited the deduction of capital losses to a deduction of 12½ per cent of the capital net loss from the partial tax computed on ordinary income.[2]

[2] Section 206 of the 1921 Act contained the first provisions for taxing capital gains at the flat rate but no limitation on the deduction of capital losses and no provision, similar to

The reports of the Senate Finance Committee and the House Ways and Means Committee, discussing section 201 (c) of the 1924 Act, make it clear that corporate liquidations were to be treated as sales and exchanges of capital assets, within section 208.[8]

D. *Losses, as well as gains, on corporate liquidations are within section 101*

The Treasury Regulations (Regulations 77, Article 625) expressly provide, and the legislative

---

115 (c) of the 1928 Act, for the treatment of corporate liquidations.

[8] The report of the Senate Committee on Finance (Report No. 398, 68th Cong., 1st sess.) states at p. 11:

"* * * The bill treats a liquidating dividend as a sale of the stock, with the result that the gain to the taxpayer is treated not as a dividend subject only to the surtax but as a gain from the sale of property *which may be treated as a capital gain.* The treatment of liquidating dividends under the bill is substantially the same as provided for in the revenue act of 1918. A liquidating dividend is, in effect, a sale by the stockholder of his stock to the corporation; he surrenders his interest in the corporation and receives money in place thereof. *Treating such a transaction as a sale and within the capital gain provisions is consistent with the entire theory of the act* and, furthermore, is the only method of treating such distributions which can be easily administered." [Italics supplied.]

The report of the House Ways and Means Committee (Report No. 179, 68th Cong., 1st sess.), at p. 11, states:

"Section 201 (c):

"(1) The existing law has no provision similar to subdivision (c) of the bill, but the Treasury has construed the existing law as taxing liquidating dividends, not as capital gains, but as dividends subject to the surtax rates. The proposed bill, as did the 1918 act, treats a liquidating dividend as a sale of the stock to the corporation and recognizes the true effect of such a distribution."

history of sections 115 (c) and 101 clearly discloses, that the gains upon corporate liquidations are capital gains if the stock was held for more than two years. Section 101 (c) (1) defines a capital gain as a taxable gain from the "sale or exchange of capital assets." Section 101 (c) (2), using the same words, defines capital loss as a deductible loss resulting from the "sale or exchange of capital assets." The provisions are inseparable. If a corporate liquidation is a "sale or exchange of capital assets" for purposes of gain within section 101 (c) (1) it must be a "sale or exchange of capital assets" for purposes of loss within section 101 (c) (2). The opposite result, if it were adopted despite the words of the statute, would do violence to the plan of the statute and defeat the plain intention of Congress in the 1928 and similar Acts that since capital gains may be taxed at a flat rate capital losses should be correspondingly limited.[4]

---

[4] Under the 1921 Act which permitted taxation of capital gains at the flat rate but did not limit deductions of capital losses these losses were deducted *in toto* even against ordinary income. Congress corrected this situation by limiting capital losses in section 208 (c) of the 1924 Act, similar to section 101 (b) of the 1928 Act. *Piper* v. *Willcuts*, 64 F. (2d) 813, 815–816 (C. C. A. 8th); George Tyler and John Ohl, *The Revenue Act of 1934*, 83 U. Pa. L. R. 607, 614 (1935). The taxpayers' present contention that the limitation fails to extend to losses in corporate liquidations on stock held more than two years cannot prevail in view of section 115 (c).

Indeed, a corporate liquidation involving stock held for more than two years was so clearly considered to be a "sale or exchange of capital assets" under the capital gains and losses provisions of the 1932 and prior Acts that when Congress wished to deny the benefit of the capital gains provisions to gains upon corporate liquidations, in view of the use of liquidations as a device to avoid surtaxes on corporate distributions, it was required to add expressly to section 115 (c) of the 1934 Act the following limitation:[4]

> Despite the provisions of section 117 (a) [the capital gains and losses section in that Act comparable to section 101 of the former Acts], 100 per centum of the gain so recognized shall be taken into account in computing net income.

The report of the Senate Committee on Finance, discussing the change, recognized that under the 1932 Act a corporate liquidation involving stock held for more than two years was treated in the same manner as a sale of stock to which the capital gains and losses provisions were applicable. One example (Case 3) given in the report, illustrating the difference in treatment of corporate liquida-

---

[4] In section 117 of the 1934 Act Congress substituted for the flat rate of tax on capital gains and the corresponding deduction of capital losses from the partial tax computed on ordinary income the different method of graduated percentages of gain or loss, recognized on the sale or exchange of capital assets, to be taken into account in computing net income at the ordinary rates.

tions under the 1934 and 1932 Acts expressly states that a loss upon a corporate liquidation involving stock held for more than two years is a capital loss under the 1932 Act.*

---

* Report of the Committee of Finance of the Senate (Rep. No. 558, 73d Cong., 2d Sess., p. 37):

> Under existing law [1932 Act similar to the 1928 Act here involved], a distribution in liquidation of a corporation is treated in the same manner as a sale of stock. This rule has serious objections, as it permits wealthy stockholders to escape surtax upon corporate earnings or profits distributed in the form of liquidating dividends. For instance, a corporation may have a surplus of $1,000,000. If the surplus is distributed as an ordinary dividend it is subject to the surtax rates in the hands of the shareholders. If it is distributed as a liquidating dividend it is subject only to the flat capital gain rate of 12½ percent in case the shareholder has held his stock for more than 2 years.
>
> * * * * * * * * * * * * The following examples illustrate the differences in the method of treating liquidating dividends under the 1932 Act and under the bill [1934 Act]:
>
> Distribution in liquidation—Stock held 3 years.
>
> * * * * *

	Corporation A	Corporation B
Case 3:		
Cost of stock to shareholder	$10,000	$10,000
Amount distributed in liquidation	12,000	5,000
Gain or (loss) on liquidation	2,000	(5,000)

> Shareholder reduces tax by 12½ percent of capital net loss of $3,000 (under 1932 act).
>
> Shareholder includes $2,000 (full gain on liquidation) in gross income and is entitled to a deductible loss of $2,000 (60 percent of $5,000 loss is $3,000, or $1,000 more than gain; amount of loss only up to amount of gain is allowed (under the bill).

The same example is given in the Report of the House Committee on Ways and Means (Rep. No. 704, 73d Cong., 2nd sess., p. 30).

The respondent submits, in conclusion of this point, that the statute on its face, the Treasury Regulations, approved by reenactment of the statute, and the legislative history of sections 101 and 115 (c), make it very plain that a corporate liquidation involving stock held more than two years is a "sale or exchange of capital assets," not only for the purposes of capital gains within section 101 (c) (1) but also for the purpose of capital losses within section 101 (c) (2).

II

THE TAXPAYERS' LOSSES ARE NOT DEDUCTIBLE UNDER SECTIONS 112 AND 23 (e) APART FROM SECTIONS 101 AND 115 (c)

The taxpayers contend (A) that a corporate liquidation is not a "sale or exchange" of capital assets within section 101 and that sections 101 and 115 (c) are mutually exclusive and are not to be read together (Petitioners' Brief, Points I and II, pp. 9–22); (B) that reenactment of sections 202 (c) and 208 of the 1924 Act is not a Congressional approval of the Treasury Regulations to the extent of an approval of a treatment of losses upon a corporate liquidation as capital losses (Brief, Point III, pp. 22–24); (C) that the respondent's contention is contrary to the history of section 115 (c) and fails to apply section 23 (e) (Brief, Points IV and V, pp. 24–30).

A. *Sections 115 (c) and 101 are not mutually exclusive*

1. The argument that sections 101 and 115 (c) are mutually exclusive, and that this result is sup-

ported by the second sentence of section 115 (c), is contrary to the entire scheme of the Revenue Act and makes the fundamental error of merging and confusing the separate and distinct questions of determination of amount of loss under section 111, recognition of loss under section 112, deductibility of the loss under section 23, and the treatment of deductible losses, if they are capital losses, under section 101. The second sentence of 115 (c) provides:

> The gain or loss to the distributee resulting from such exchange [corporate liquidation] shall be determined under section 111, but shall be recognized only to the extent provided in section 112. * * *

An examination of the plan of the statute discloses the taxpayers' error. Sections 11, 12, and 13 levy a tax for each taxable year on the net income of every individual and corporation. Section 12, levying a surtax on the net income of individuals, expressly refers in subsection (c) to section 101 for the rate and computation of tax on capital net gains. Section 21 provides that net income means gross income computed under section 22 less the deductions allowed by section 23.

Section 22 (d) provides that distributions by corporations shall be taxable to the shareholders as provided in section 115. Section 115 (c) provides that amounts distributed in liquidations shall be treated as the full payment in exchange for the stock and the gain or loss shall be determined un-

der section 111 and recognized to the extent provided in section 112. Recognition of a loss under section 112 is not a determination that the loss is deductible but is merely a determination that the taking account of a deductible loss in computing net income is not to be postponed until a later year. The question whether the recognized loss is of a type which Congress permits to be deducted is determined under section 23. And if the loss is within the type of loss permitted by section 23, the question remains whether it is a capital loss which may be deducted only to the extent and in the manner provided in section 101. The statute makes it clear that sections 23 and 101 are interdependent. Section 101 (c) (2) defines capital loss as a "*deductible* loss resulting from the sale or exchange of capital assets." Moreover, section 101 expressly refers to section 23 and further provides in part:

> (3) "Capital deductions" means such deductions as are allowed by Section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets sold or exchanged during the taxable year.
>
> (4) "Ordinary deductions" means the deductions allowed by Section 23 other than capital losses and capital deductions.
>
> (8) "Capital assets" means property held by the taxpayer for more than two years * * *.

2. Cases cited by the taxpayers such as *Burnet* v. *Harmel*, 287 U. S. 103; *United States* v. *Fairbanks*, 95 F. (2d) 794 (C. C. A. 9th), certiorari denied,

No. 65, present term, October 10, 1938; and *McFeely* v. *Commissioner*, 296 U. S. 102, plainly have no application because they do not involve corporate liquidations or the application of section 115 (c).

In *United States* v. *Fairbanks*, *supra*, it was held, in the absence of a provision with respect to bonds similar to section 115 (c) with respect to stock, that the redemption and the retirement of bonds constituted neither a sale nor an exchange of capital assets but payment, pursuant to call, of a fixed corporate obligation in accordance with its terms. The distinction between that case and the present case, involving section 115 (c), is emphasized by the fact that when Congress wished to change the rule and make redemption of bonds a sale or exchange, in order to avoid a different treatment upon a sale and upon redemption (*John D. McKee et al., Trustees* v. *Commissioner*, 35 B. T. A. 239), it merely adopted the language in section 115 (c) with respect to corporate liquidations and provided in section 117 (f) of the 1934 Act that amounts received upon the retirement of bonds "shall be considered as amounts received in exchange therefor."

B. *Congress, by Reenactment of Sections 201 (c) and 208 of the 1924 Act, Did Approve Article 1545 of Regulations 65*

The taxpayers contend (Brief pp. 21–24) that by adding to section 101 (b) of the 1928 Act the ex-

planatory phrase "(as hereinafter defined in this section)" not found in section 208 (c) of the 1926 Act, Congress disapproved the regulations, construed to apply the capital losses as well as the capital gains provisions to corporate liquidations.

The respondent submits that a comparison of the whole of section 208 of the 1926 Act with the whole of section 101 of the 1928 Act makes it appear that the addition is not one of substance but purely one of form in connection with the new form in which the capital gains and losses provisions, and the entire 1928 Act, were cast. Section 101 (a) provides for the tax on capital net gain as thereafter defined in the section. Section 101 (b) provides for the tax in case of the capital net loss as thereafter defined in the section. Section 101 (c) contains the definitions. Section 208 (a) of the 1926 Act, however, contained the definitions and when section 208 (b) providing for a tax on capital net gain and section 208 (c) providing for the tax in cases of a capital net loss were reached there was no need to make reference to definitions of capital net gain and capital net loss which had already been made in section 208 (a).

C. *The respondent's construction of section 115 (c) is not contrary to its history and purpose*

The taxpayers contend (Brief pp. 22–28) that there is no intrinsic evidence in the statute that Congress intended gain or loss on corporate liqui-

dations to be treated as capital gain or loss, in view of the fact that when the provisions of section 115 (c) of the 1928 Act first appeared in section 201 (c) of the 1918 Act there was no special provision for capital gains or losses. The taxpayers argued that when special provisions for sales or exchanges of capital assets were adopted in the 1921 and subsequent Acts it is not to be inferred that corporate liquidations are within such sales and exchanges. The respondent submits that Congress provided in section 201 (c) of the 1918 Act that corporate liquidations should be treated as sales or exchanges of stock generally and when Congress provided a special method for treating sales and exchanges as capital gains and losses and continued section 201 (c) of the 1918 Act it intended that the capital gains and losses provisions should also apply to corporate liquidations. Approval of the Treasury regulations treating gains upon corporate liquidations as capital gains by reenactment of the statute (*supra*, p. 10), and the Committee reports (*supra*, p. 12), indicate clearly that Congress intended losses and gains on corporate liquidations involving stock held more than two years to be treated as capital gains and losses.

The taxpayers' further contention (Brief pp. 28–30) that the decision of the court below fails to apply section 23 (e) is untenable. Section 101 (b) limits section 23 (e). A loss upon the sale or exchange of stock, including corporate liquidations,

is taken into account under 23 (e), and in this manner section 23 (e) is applied. But section 101 (b) limits the deduction under section 23 (e) if the stock has been held for more than two years (*supra*, p. 18).

Helvering v. *Bliss*, 293 U. S. 144, does not support the taxpayers' contention. That case involved section 23 (n) (2) of the 1928 Act, which expressly provided that charitable contributions should be allowed as deductions to an amount not in excess of 15 per centum of the taxpayer's "net income," and this Court rejected the Commissioner's contention that the deduction should be limited to 15 per centum of the taxpayer's "ordinary net income" under section 101. In the present case, however, the intention of Congress is clear that losses upon the sale or exchange of capital assets, including such losses on corporate liquidations should be limited by section 101.

The taxpayers' argument assumes far too much because logically it is not restricted to corporate liquidations, and if followed, all capital losses, even on the sale of stock to third persons, would not be subject to the limitations of section 101, because section 23 (e) also determines the deductibility of that type of loss although section 101 limits the amount of the deduction.

D. *The respondent's construction does not involve a harsh or absurd result*

The taxpayers contend (Br. pp. 20–22) that the decision of the court below leads to absurd consequences because a "small liquidating distribution is made to be more disadvantageous than no distribution at all" (Br. p. 20). The respondent submits that the different tax treatment of corporate liquidations and worthless stocks does not establish that corporate liquidations have been incorrectly treated by the court below, and, furthermore, the general rule for the treatment of corporate liquidations can not be modified to meet the supposed harsh result of a stated hypothetical case.

1. The fact that the deduction of the entire loss from worthless securities is not limited by the 1928 Act does not indicate that the statute should be construed as not limiting the loss in the entirely different situation where an amount is distributed in a corporate liquidation. Indeed, the treatment of worthless securities as a loss from the sale or exchange of capital assets under section 23 (k) (2) of the 1938 Act indicates that the asserted harshness of the unequal treatment of liquidating dividends and worthless securities under earlier acts is due to the failure to treat worthless securities as a sale or exchange rather than to the failure to treat corporate liquidations like worthless securities.

2. The suggestion that in the stated hypothetical case a harsh or illogical result will follow from the decision of the court below is answered by *Helvering* v. *Twin Bell Syndicate*, 293 U. S. 312, 321, in which this Court rejected the similar argument that unjust and unequal results would follow if the depletion allowance of 27½ percent of gross income from oil wells was based not on gross proceeds but upon gross proceeds less royalties paid. This Court pointed out that equally illogical results might ensue from the taxpayer's construction. Cf. *Lang* v. *Commissioner*, 289 U. S. 109, 113; *Echols* v. *Commissioner*, 61 F. (2d) 191, 192, 194 (C. C. A. 8th). So here, equally illogical results will ensue from an application of the section as the petitioners construe it. If Section 101 does not apply to losses from liquidation, it does not apply to gains from liquidation. Hence one who has a gain of $100,000 from the sale of a capital asset may at his option be taxed at 12½ percent (Section 101 (a)), while under petitioners' theory, if the same gain resulted from the liquidation of a corporation whose stock had been held more than two years, it must be returned at the normal and surtax rates—up to a total of 63 percent.

Moreover, "only as there is clear provision therefor can any particular deduction be allowed." *New Colonial Co.* v. *Helvering*, 292 U. S. 435, 440. The taxpayers have failed to show that the loss is

clearly allowed by section 23 (e) apart from section 101. In fact, the respondent submits, the loss plainly is limited by section 101.

III

IN NO. 97 RECOVERY IS LIMITED IN ANY EVENT TO $127.64 WITH INTEREST BECAUSE THE REFUND CLAIM WAS FILED TOO LATE WITH RESPECT TO ANY ADDITIONAL AMOUNT

In No. 97 the estate of William A. White paid the income tax of $35,041.11 shown to be due on its return for 1929 in four approximately equal installments, as follows (R. 40):

March 15, 1930	$885.28
June 14, 1930	885.28
September 15, 1930	885.27
December 15, 1930	885.28

On July 28, 1931, the Bureau of Internal Revenue notified the executor of the estate that a redetermination of the tax liability for 1929 disclosed an overassessment of $757.64 but that the loss of $22,500 on the stock of Del-Bay Farms, Incorporated, was treated as a capital net loss. On December 31, 1931, the overassessment of $757.64 was refunded to the estate with interest of $43.53 (R. 40).

On December 15, 1932, more than two years after payment of the third installment of the tax on September 15, 1930, the executor filed a claim for refund of $446.06 based on the alleged error of treating the loss of $22,500 as a capital net loss. On May 9, 1933, the Commissioner notified the executor that the claim had been disallowed on the ground that the loss was a capital loss (R. 41).

The court below stated in its opinion that its decision on the merits made it unnecessary to consider this question of the statute of limitations (R. 47).

The controlling statute of limitations, section 322 (b) of the 1928 Act, provides:

> (b) *Limitation on allowance.*—
>
> (1) *Period of Limitation.*—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.
>
> (2) *Limit on Amount of Credit or Refund.*—The amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim, or if no claim was filed, then during the two years immediately preceding the allowance of the credit or refund.

It is apparent that as $757.64 was refunded to the estate on December 31, 1931, the remainder of the installment of $885.28 paid on December 15, 1930, was $127.64. It is submitted, therefore, that $127.64 with interest is the maximum recoverable by the taxpayer in this case in any event as it is the only "portion of the tax paid during the two years immediately preceding the filing of the claim" within the clear language of section 322 (b) (2). *Harr* v. *United States*, 20 F. Supp. 206, 208 (E. D. Pa.); *Broderick* v. *Anderson*, 23 F. Supp. 488, 493–494 (S. D. N. Y.). Compare *Blair* v. *Birkenstock*, 271 U. S. 348.

In *Blair* v. *Birkenstock*, *supra*, the 1919 income tax was paid in four installments in 1920. In 1924

the Commissioner determined that a refund should be made. Section 1019 of the 1924 Act provided that upon the refund of any tax erroneously or illegally assessed or collected interest shall be allowed from the date such tax was paid. The taxpayer contended, and the lower court held (55 App. D. C. 376), that interest should be computed on the excess of each quarterly payment over one-fourth of the proper amount of tax from the day of each quarterly payment. The Government, relying on sections 250 and 252 of the Revenue Act of 1918, in force when the tax was paid, and providing in part that an excess installment shall be credited against subsequent installments, contended that an excess quarterly payment became a tax erroneously collected under section 1019 of the 1924 Act only when the amount paid, added to previous payments, exceeded the agreed proper amount of the tax for that year.

This Court held (p. 353) that these sections, read together, show that the mere overpayment of an installment is treated as a payment on account of the tax "which is assessed for that year" and is not a tax erroneously collected within section 1019 of the 1924 Act and that interest may be recovered only from the date of a payment in excess of the total tax and subject to refund.

Provisions similar to sections 250 and 252 of the 1918 Act are found in sections 56, 57, 321, and 322 of the 1928 Act applicable to the present case. The

second sentence of section 321, similar to section 250 (b) of the 1918 Act, provides:

> If the amount already paid, on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the overpayment shall be credited or refunded as provided in section 322.

In the present case "the amount determined to be the correct amount of the tax" by the Commissioner was $2,783.47, the total amount paid, $3,541.11, less the overassessment and refund of $757.64. Consequently, pursuant to sections 321 and 322, the Commissioner determined that the tax had been overpaid in the sum of $757.64 on December 15, 1930, when the last installment of $885.20 was paid, and refunded part of that installment.[1]

The respondent submits, therefore, that under the refund claim filed on December 15, 1932, more than two years after payment of the third installment, there can be recovered only $127.64, the difference between the last installment payment of $885.28 and the refund of $757.64. On the authority of *Blair* v. *Birkenstock, supra,* this construction of the provisions of the 1928 Act has been adopted in *Harr* v. *United States, supra,* and *Broderick* v. *Anderson, supra.*

---

[1] The interest of $43.53 allowed on the refund of $757.64, less than a year's interest at 6 per cent., also makes it apparent that interest was computed from the date of overpayment on December 15, 1930, to a date within 30 days preceding the date of the refund check, approximately December 31, 1931, under section 614 (a) (2) of the 1928 Act.

In order to avoid this construction the taxpayer contended in his reply brief in the court below that this question of the statute of limitations should be determined by assuming that this Court will decide the question of the loss on the corporate liquidation in the taxpayer's favor, although the Commissioner and the court below decided that question otherwise, and that, accordingly, the correct tax is $2,337.41, the tax determined by the Commissioner in the amount of $2,783.47 minus the claimed refund of $446.06. If this assumption were correct, $318.42 of the third installment and all of the fourth installment would be an overpayment. On this assumption the taxpayer argues that the refund should be considered as having been applied first against the assumed first overpayment of $318.42 and the balance in the amount of $439.22 against the last installment, leaving a balance of the last installment of $446.06, to be refunded pursuant to the refund claim filed December 15, 1932.

The taxpayer's contention is erroneous because the Commissioner did not apply the refund to any part of the third installment. Section 321 authorizes the Commissioner to refund an amount which "exceeds the amount determined to be the correct amount of the tax," but does not authorize the refund of an amount which exceeds the amount which the taxpayer claims to be the correct amount of the tax. The Commissioner determined that the correct tax was $2,783.47 and that the tax had been

overpaid in the sum of $757.64 on December 15, 1930, and, accordingly, refunded that part of the last installment. Consequently, the taxpayer's alleged additional overpayment of $446.06 was made on December 15, 1930, only to the extent of $127.64 and the remainder of the alleged additional overpayment was made on September 15, 1930.

Section 322 (b) (2) prohibits any refund in excess of the portion of the tax paid during the two years immediately preceding the filing of the claim. After the refund the amount of $127.64 was the only portion of the tax paid during the two years immediately preceding the filing of the claim. The respondent submits, therefore, that recovery upon the present refund claim filed on December 15, 1932, is limited to the alleged overpayment of $127.64.

CONCLUSION

The decision below is correct and should be affirmed.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.
JAMES W. MORRIS,
Assistant Attorney General.
J. LOUIS MONARCH,
A. F. PRESCOTT,
Special Assistants to the Attorney General.
EDWARD J. ENNIS,
Attorney.

NOVEMBER 1938.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 11. NORMAL TAX ON INDIVIDUALS.

There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax equal to the sum of the following:

(a) 1½ per centum of the first $4,000 of the amount of the net income in excess of the credits against net income provided in section 25;

(b) 3 per centum of the next $4,000 of such excess amount; and

(c) 5 per centum of the remainder of such excess amount.

SEC. 12. SURTAX ON INDIVIDUALS.

(c) *Capital net gains and losses.*—For rate and computation of tax in lieu of normal and surtax in case of net incomes of not less than $30,000, approximately, or in case of net incomes, excluding items of capital gains, capital loss, and capital deductions, of not less than $30,000, approximately, see section 101.

* * * * *

SEC. 21. NET INCOME.

"Net income" means the gross income computed under section 22, less the deductions allowed by section 23.

SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions,

vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * * * * *

(d) *Distributions by corporations.*—Distributions by corporations shall be taxable to the shareholders as provided in section 115.

(e) *Determination of gain or loss.*—In the case of a sale or other disposition of property, the gain or loss shall be computed as provided in sections 111, 112, and 113.

* * * * *

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

* * * * *

(e) *Losses by individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or * * *

* * * * *

(f) *Losses by corporations.*—In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

* * * * *

SEC. 101. CAPITAL NET GAINS AND LOSSES.

(a) *Tax in case of capital net gain.*—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in

this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

(b) *Tax in case of capital net loss.*—In the case of any taxpayer, other than a corporation, who for any taxable year sustains a capital net loss (as hereinafter defined in this section), there shall be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted, and the total tax shall be this amount minus 12½ per centum of the capital net loss; but in no case shall the tax of a taxpayer who has sustained a capital net loss be less than the tax computed without regard to the provisions of this section.

(c) *Definitions.*—For the purposes of this title—

(1) "Capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921.

(2) "Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

(3) "Capital deductions" means such deductions as are allowed by section 23 for the purpose of computing net income, and are properly alocable to or chargeable against capital assets sold or exchanged during the taxable year.

(4) "Ordinary deductions" means the deductions allowed by section 23 other than capital losses and capital deductions.

(5) "Capital net gain" means the excess of the total amount of capital gain over the sum of (A) the capital deductions and capital losses, plus (B) the amount, if any, by which the ordinary deductions exceed the gross income computed without including capital gains.

(6) "Capital net loss" means the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gain.

(7) "Ordinary net income" means the net income, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital deductions.

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

(A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112 (g) of this title or under the provisions of section 203 (c) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

(d) *Collection and payment of tax.*—The total tax determined under subsection (a) or (b) shall be collected and paid in the same manner, at the same time, and subject to the same provision of law, including penalties, as other taxes under this title.

* * * * *

SEC. 111. DETERMINATION OF AMOUNT OF GAIN OR LOSS.

(a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

* * * * *

(d) *Recognition of gain or loss.*—In the case of a sale or exchange, the extent to

which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 112.

* * * * *

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

* * * * *

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

* * * * *

(c) *Distributions in liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. * * *

* * * * *

(h) *Definition of partial liquidation.*—As used in this section the term "amounts distributed in partial liquidation" means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock.

Revenue Act of 1924, c. 234, 43 Stat. 253.

SEC. 201.

* * * * *

(c) Amounts distributed in complete liquidation of a corporation shall be treated

as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 202, but shall be recognized only to the extent provided in section 203. * * *

* * * * *

SEC. 208. (a) For the purposes of this title—

* * * * *

(2) The term "capital loss" means deductible loss resulting from the sale or exchange of capital assets.

Revenue Act of 1926, c. 27, 44 Stat. 9.

SEC. 201.

* * * * *

(c) Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 202, but shall be recognized only to the extent provided in section 203. * * *

* * * * *

SEC. 208. (a) For the purposes of this title—

* * * * *

(2) The term "capital loss" means deductible loss resulting from the sale or exchange of capital assets.

Treasury Regulations 74:

ART. 625. *Distributions in liquidation.*—Amounts distributed in complete liquidation of a corporation are to be treated as in full payment in exchange for the stock, * * *.

* * * * * * *

Any gain to the shareholder may, at his option, be taxed as a capital net gain in the manner and subject to the conditions prescribed in section 101 and articles 501–503. * * *

Regulations 65, Art. 1545 (promulgated under the 1924 Act) and Regulations 69, Art. 1545 (promulgated under the 1926 Act) are similar to the above regulations.

U. S. GOVERNMENT PRINTING OFFICE: 1933

SUPREME COURT OF THE UNITED STATES.

Nos. 96, 97.—October Term, 1938.

Harold T. White, Alexander M. White, Jr., and William I. Frothingham, as Executors of the Estate of Alexander M. White, Petitioners,
96 vs.
The United States.

Harold T. White, Sole Surviving Executor of the Estate of William A. White, Petitioner,
97 vs.
The United States.

On Writs of Certiorari to the Court of Claims.

[December 5, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

The question decisive of this case is whether, under §§ 23 and 101 of the Revenue Act of 1928, 45 Stat. 791, upon a liquidation of a corporation, stockholders' losses from their investment in its stock held for more than two years are ordinary losses deductible in full from gross income, or capital losses, 12½% of which is deductible under § 101 from the tax as computed without regard to such losses.

The decedent in each of these cases made an investment represented by shares of stock in a corporation. Upon complete liquidation of the corporation, more than two years later, the total liquidating dividends on the stock amounted to less than the cost of the investment. In their income tax returns for 1929 petitioners deducted from gross income the losses of their respective decedents. The commissioner ruled that the losses were capital net losses of which only 12½% was deductible, as provided by § 101, and he accordingly found deficiencies, which petitioners paid.

In the present suits, brought by petitioners in the Court of Claims to recover the payments of the deficiencies as overpayments of 1929 tax, recovery was denied. 21 Fed. Supp. 361. We granted certiorari, — U. S. —, to resolve a conflict between the decision below and that of the Court of Appeals for the Ninth Circuit

in *Chester N. Weaver Co.* v. *Commissioner*, 97 F. (2d) 31, certiorari granted, — U. S. —, which arose under related sections of the 1932 Revenue Act.

Section 23(e) of the 1928 Act declares that "In computing net income there shall be allowed as deductions . . . losses sustained during the taxable year . . . (2) if incurred in any transaction entered into for profit, though not connected with the trade or business; . . . ." And sub-section (g) provides: "The basis for determining the amount of deduction for losses sustained . . . shall be the same as is provided in section 113 for determining the gain or loss from the sale or other disposition of property."

These provisions of § 23 are qualified and restricted by § 101, which prescribes rates of tax applicable to capital net gains and the extent to which capital net losses are deductible in arriving at net taxable income. Section 101(c) (1) and (2) of the Revenue Act of 1928 defines "capital gain" as a "gain from the sale or exchange of capital assets" and "capital loss" as a "deductible loss resulting from the sale or exchange of capital assets." Section 101(c) (3) and (4) declares: " 'Capital deductions' means such deductions as are allowed by section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets sold or exchanged during the taxable year . . . ;" and " 'ordinary deductions' means the deductions allowed by section 23 other than capital losses and capital deductions." By § 101(c) (5) and (6) a "capital net gain" or "loss" results from the sale of "capital assets", which are defined by § 101(c) (8) as "property held by the taxpayer for more than two years", not including "stock in trade . . . or other property" held by the taxpayer "primarily for sale in the course of his trade or business."

Sections 23 and 101 place capital gains and losses as thus defined on a different basis from other types of gains and losses for the purpose of computing the tax. By § 101(a) a capital net gain as defined by § 101(c) (5) may, at the option of the taxpayer, be assessed at the rate of 12½% in lieu of all other taxes, and by § 101(b) a capital net loss, defined by § 101(6) as "the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gain," may be deducted, only to the extent of 12½%, from the tax as computed without regard to the capital net loss. These sections, read together with §§ 12, 23 and 22, presently to be discussed, thus provide a complete scheme for ascertaining capital gains and losses from the sale or exchange of property and for bringing them into the computation of the tax on net in-

come, a scheme distinct from that applicable to other types of gains and losses resulting in ordinary net income, including those from sales and exchanges of property not capital assets.

The losses here sustained are concededly losses on investments of capital, entitled to recognition in the computation of taxable net income, but petitioners' contention is that as the losses did not result from a sale or exchange of the stock they are not capital losses within the meaning of § 101, which limits the deduction of such losses, and that in consequence they fall into the category of ordinary losses, deductible in full under § 23. The answer to this contention turns upon the meaning and effect of § 115(c), which relates to distributions by corporations and appears in Supplement B of the 1928 Act. The section provides in part:

"Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. . . ."

Section 111 contains the provisions for computation of gain or loss from the sale or other disposition of property and refers, as does § 23(g), to § 113 as affording the basis for determining gain or loss upon sales or exchanges of property. By § 112(a) it is provided that "Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section."[1]

Petitioners concede that the command of § 115(c) that amounts distributed in complete liquidation of a corporation "shall be treated as in full payment in exchange for the stock" and that the "gain or loss . . . shall be determined under section 111," requires the gain or loss upon liquidation to be determined as are gains or losses upon sale of the stock under §§ 111, 113. The same method is adopted by 101 for determining gains or losses from sales of capital assets.[2] But they insist that the qualification that gain or loss "shall be recognized only to the extent provided in section 112" and the fact that the provisions of § 101 apply only to cases of

[1] The enumerated exceptions, none of which are applicable in the present case, relate to specified types of gains or losses upon exchange of property, some of which are excluded from the recognition accorded generally by the section to such gains and losses.

[2] The method of computing capital gains under § 101 is in substance that of §§ 111, 112 and 113, which is identified by §§ 22 and 23 with that pre-

sales or exchanges exclude the stockholders' gain or loss upon liquidation, which is not a sale or exchange, from the operation of the provisions of § 101 governing the computation of the tax.

Sections 101 and 115(c) are found in the provisions supplemental to the general provisions of sub-title B of the 1928 Revenue Act, which is concerned with rates of tax and computation of net income. Section 101 appears in Supplement A, relating to rates of tax, and § 115 in Supplement B, concerning computation of net income. Both supplements serve to modify or explain the general provisions. " . . . . the Supplemental Provisions are those which apply only to extraordinary classes of taxpayers or which apply only to the extraordinary transactions of ordinary classes of taxpayers." Report, Committee on Ways and Means, No. 2, 70th Cong., 1st Sess., p. 12. From the arrangement and general plan of the Act it is evident that the effect of §§ 101 and 115 upon each other is not to be ascertained alone by the comparison of the two sections or by noting the absence of any reference to either by the other, but by noting and comparing the effect of each upon the general provisions, to which reference must be made in the first instance for all computations of income tax.

Sections 12, 21, 22 and 23, found in sub-title B, General Provisions, to which §§ 101 and 115 are supplementary, govern computation of net income and of the tax. Subsection (c) of § 12, which fixes the rates of surtax, refers specifically to § 101 for the rate and computation of tax on capital net gains and losses.[3] Section 21 declares that net income means gross income computed under § 22, less the deductions allowed by § 23. As already noted, § 23(e), (g), providing for deductions of losses on sales or

---

scribed for ascertaining the gain to a stockholder upon corporate liquidation by § 115. By § 22(d) it is provided: "Distributions by corporations shall be taxable to the shareholders as provided in section 115"; and "(e) In the case of a sale or other disposition of property, the gain or loss shall be computed as provided in sections 111, 112, and 113." Section 101 in terms provides that "'Capital deductions' means such deductions as are allowed by section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets sold or exchanged during the taxable year." And § 23(g) provides: "The basis for determining the amount of deduction for losses sustained . . . shall be the same as is provided in section 113 for determining the gain or loss from the sale or other disposition of property."

[3] Sec. 12(c): "Capital net gains and losses.—For rate and computation of tax in lieu of normal and surtax in case of net incomes of not less than $30,000, approximately, or in case of net incomes, excluding items of capital gain, capital loss, and capital deductions, of not less than $30,000, approximately, see section 101."

Only in the case of incomes in excess of $30,000, approximately, do the aggregate of the normal and surtax exceed the 12½% rate provided for in § 101.

exchanges of property, is restricted in its operation by the provisions of § 101. Otherwise, § 101 would have no application to deductible losses. These general provisions thus incorporate by reference those of § 101 and give to them controlling effect in the computation of the tax in cases of capital gains or losses upon the sale or exchange of capital assets. In addition, § 22(d) provides that "Distributions by corporations shall be taxable to the shareholders as provided in section 115," which in turn, as already noted, provides in paragraph (c) that liquidating dividends "shall be treated as in full payment in exchange for the stock," and that resulting gains or losses determined, as in the case of sales or exchanges of property, under § 111, are to be "recognized only to the extent provided in section 112," which also deals with sales and exchanges.

Section 115(c) and §§ 111 and 112, to which it refers, standing alone give no clue to the part which a stockholder's loss on liquidation is to play, in computation of the tax, more than they give in the case of gains and losses upon sales or exchanges of property. In each case they tell how the gain or loss is to be "determined" and declare that it shall be "recognized." But as § 115 says that the gain or loss upon liquidation is to be "recognized" only to the extent to which gains or losses upon sales or exchanges of property are recognized by § 112, it follows that in one case, as in the other, we must turn to the general provisions of the Act to learn what recognition is to be given to the gains or losses under §§ 12, 22 and 23, as supplemented by § 101. Admittedly the recognition accorded by § 112 to gains and losses on sales of capital assets is controlled by § 101, and § 115(c), with its reference to § 112, is explicit that gains and losses upon liquidations are to receive the recognition accorded to gains and losses upon sales of property. Consequently the recognition required by § 115(c) of gains and losses on liquidations must, we think, be taken to be the same as that accorded to gains and losses upon sales of property in the computation of the tax under the general provisions to which § 115 and § 112 are supplementary and to be subject to the same restrictions as are imposed upon recognition of gains and losses from sales by the provisions of the supplementary section 101. Stockholders' gains and losses upon liquidation of the corporation are thus taxed on the same basis as gains or losses upon sales and exchanges of property, with the rate of tax and deductions prescribed by § 101.

If this conclusion were doubtful, doubts would be put at rest by the judicial construction of § 115(c) as it appeared in the 1918 Act

and by the legislative history of §§ 101 and 115. The substance of the first sentence of § 115(c) of the 1928 Act appeared, but without the reference to §§ 111 and 112, in § 201(c) of the 1918 Act, which provided that "Amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, . . ."[4] In *Hellmich* v. *Hellman*, 276 U. S. 233, it was held that this clause required a stockholder's gains upon liquidation to be treated as gains from the sale of property and therefore subject to the normal tax, although they were distributions from corporate earnings, and, under §§ 201(a), (b) and 216(a) dividends paid from such earnings were free from normal tax. The provisions of § 115(c) prescribing the treatment of liquidating dividends were thus, from the beginning, taken to refer to the computation of the tax as well as to the determination of the gain or loss.

The addition to the section in the 1924 and later Acts of the direction that gain or loss should be determined under the section corresponding to § 111 of the 1928 Act and recognized only to the extent provided in the section corresponding to § 112 of that Act requires no different result. For reasons already given it supports the conclusion that § 115(c), like its precursor, § 201(c) of the 1918 Act, as construed in *Hellmich* v. *Hellman, supra*, placed shareholders' gains and losses from liquidations upon the same basis, for computation of the tax, as gains and losses upon the sale or exchange of property. The reports of the Congressional Committees discussing § 201(c) of the 1924 Act make it plain that that section, the relevant portion of which is identical with § 115(c) of the 1928 Act, was intended to require gains upon corporate liquidations to be brought into the computation of the tax in the same manner as corresponding gains from sales.[5]

Article 625 of Treasury Regulations 74, interpreting §§ 101 and 115(c) of the 1928 Act, states in part: "Any gain to the shareholder [from a distribution in liquidation of a corporation] may, at his option, be taxed as a capital net gain in the manner

[4] Section 201(c) of the 1918 Act, omitted from the 1921 Act, was continued, so far as now relevant, in the form in which it later appeared in § 115(c) of the Act of 1928, as § 201(c) of the 1924 and 1926 Acts, and as § 115(c) of the 1932 and 1934 Acts. The provisions of § 101 for computing capital gains or losses upon sales or exchanges and taxing them on a different basis from ordinary income first appeared as § 206 of the Revenue Act of 1921, which was continued as § 208 of the Revenue Acts of 1924 and 1926 and as § 101 of the Revenue Acts of 1928 and 1932.

[5] The Report of the Senate Committee on Finance (Report No. 398, 69th Cong., 1st Sess.) states at page 11: " . . . The bill treats a liquidating dividend as a sale of the stock, with the result that the gain to the taxpayer is treated not as a dividend subject only to the surtax but as a gain from the

and subject to the conditions prescribed in section 101 . . . . ." This regulation is a clear recognition that §§ 115 and 101, when read with the other sections of the Act, are interdependent and require stockholders' gains upon liquidation to be taxed as are the corresponding gains on sales of property. The regulation, in identical form, first appeared in Article 1545 of Regulations 65 and 69, applicable to §§ 201(c) and 208 of the Revenue Acts of 1924 and 1926, corresponding to §§ 115(c) and 101 of the 1928 Act, and was continued in Article 625 of Regulations 77 with relation to the corresponding sections, 115(c) and 101, of the 1932 Act.

The repeated reenactment of §§ 101 and 115(c), as they appear in the Revenue Acts of 1924, 1928, and 1932, is upon accepted principles a Congressional adoption of the regulation as correctly interpreting those sections and is Congressional recognition that §§ 101 and 115(c) are to be read together in order to ascertain the method by which gains and losses upon liquidation are to be taxed. The method, in the case of stock held for more than two years, is that applied by § 101 to capital gains and losses from the sale or exchange of property.

The fact that neither the decision in *Hellmich* v. *Hellman, supra,* nor the regulation deals specifically with losses does not admit of the conclusion that the stockholders' losses on liquidation are to be brought into computation of the tax on a basis different from gains and losses upon sales. Section 115(c) makes no distinction between the recognition of gains and the recognition of losses, and if one is controlled by the provisions of § 101 the other must be. No adequate basis has been suggested for such a distinction.

We attach no significance to the circumstance that the provisions of § 101 of the 1928 Act first appeared in the 1921 Act, while the controlling provisions of § 115(c) were enacted in the 1918 Act and in their final form in the 1924 Act. We accept petitioner's contention that all the provisions of § 101 are by its terms restricted

---

sale of property which may be treated as a capital gain. The treatment of liquidating dividends under the bill is substantially the same as provided for in the revenue act of 1918. A liquidating dividend is, in effect, a sale by the stockholder of his stock to the corporation; he surrenders his interest in the corporation and receives money in place thereof. Treating such a transaction as a sale and within the capital gain provisions is consistent with the entire theory of the act and, furthermore, is the only method of treating such distributions which can be easily administered."

The Report of the House Ways and Means Committee (Report No. 179, 68th Cong., 1st Sess.) states with respect to § 201(c), at page 11: " . . . the Treasury has construed the existing law as taxing liquidating dividends, not as capital gains, but as dividends subject to the surtax rates. The proposed bill, as did the 1918 act, treats a liquidating dividend as a sale of the stock to the corporation and recognizes the true effect of such a distribution."

to cases of sales or exchanges. But if, as we have said, § 115(requires the tax in case of liquidations to be computed upon t same basis as in case of sales of the stock, alteration in the method ascertaining the tax could be made more readily by adding § 101 amending it than by amending § 115(a), so long as it is the pu pose to treat gains and losses on liquidation no differently fr gains and losses on sales. No. 304, *Helvering* v. *Chester N. Weav Co.*, decided this day.

Petitioner argues that the construction which we think corr leads to the harsh and absurd consequence that a small liquidati dividend is more disadvantageous to the taxpayer than no distrib tion at all in the case where the stock has become worthless. Th is an argument, more properly addressed to Congress, that t statute should have gone further than it did by providing that t loss in the case of worthless securities should be treated as a l upon their sale, as was later done by § 23(g) (2) of the 1938 A But it is not persuasive that we should disregard the language a history of the pertinent sections, with consequences equally har and absurd, to adopt the construction for which petitioners co tend. Cf. *Helvering* v. *Twin Bell Oil Syndicate*, 293 U. S. 312, 3

We are not impressed by the argument that, as the question he decided is doubtful, all doubts should be resolved in favor of t taxpayer. It is the function and duty of courts to resolve doub We know of no reason why that function should be abdicated in tax case more than in any other where the rights of suitors tu on the construction of a statute and it is our duty to decide wh that construction fairly should be. Here doubts which may ar upon a cursory examination of §§ 101 and 115 disappear when th are read, as they must be, with every other material part of t statute, *Hellmich* v. *Hellman*, *supra*, 237, and in the light of th legislative history. Moreover, every deduction from gross inco is allowed as a matter of legislative grace, and "only as there is cl provision therefor can any particular deduction be allowed . a taxpayer seeking a deduction must be able to point to an app able statute and show that he comes within its terms." *Colonial Ice Co.* v. *Helvering*, 292 U. S. 435, 440.

We have considered, but find it unnecessary to discuss, o arguments of petitioners of lesser moment.

Affirme

Mr. Justice McReynolds, Mr. Justice Butler, and Mr. J Roberts dissent.